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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF RHODE ISLAND,

Petitioner,

v.

CLAUS von BÜLOW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF RHODE ISLAND

BRIEF AMICI CURIAE OF THE STATES OF ARIZONA AND CONNECTICUT, AND MOTION TO JOIN BRIEF BY AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE VICTIMS ASSISTANCE LEGAL ORGANIZATION, INC., AS AMICI CURIAE IN SUPPORT OF REVERSAL

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STATEMENT OF THE STATES OF ARIZONA AND CONNECTICUT

The States of Arizona and Connecticut appear as *amici curiae* pursuant to Rule 36, Par. 4, which brief is sponsored by the Hon. Robert Corbin, Attorney General for the State of Arizona, and by Austin J. McGuigan, Chief State's Attorney and chief law enforcement official for the State of Connecticut: the Connecticut Attorney General does not exercise criminal jurisdiction.

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MOTION FOR LEAVE TO JOIN BRIEF AS AMICI CURIAE

Additional parties respectfully seek leave of this Court to join the brief as *co-amici*. These parties are **AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.**, the **INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.**, and the **VICTIMS ASSISTANCE LEGAL ORGANIZATION, INC.**

Movants have received the consent of the Petitioner to join this brief (see letter of Dennis J. Roberts, II, Attorney General for the State of Rhode Island, as filed with the Clerk). The attorney for the Respondent, Alan Dershowitz, Esq., has not responded to Movants' request for consent to join this brief.

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operations of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* fifty-seven times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

THE VICTIMS ASSISTANCE LEGAL ORGANIZATION, INC. (VALOR) of Virginia Beach, Virginia, is a national not-for-profit organization. **VALOR** serves as a clearinghouse of information for attorneys who represent the legal rights of crime victims, and for other victim advocates. Frank G. Carrington, Esq., the founder and executive director of **VALOR** is the Immediate Past Chairperson of the Victims' Committee of the American Bar Association's Criminal Justice Section and served as a Member of the President's Task Force on Victims of Crime (1982).

INTEREST OF AMICI AND MOVANTS

Amici and Movants support the State of Rhode Island in its argument before this Court that the police conduct in this case did not go beyond the private search upheld in *United States* v. *Jacobsen,* ____ U.S. ____, 104 S. Ct. 1652 (1984).

We also support the argument of the State that the "search" conducted by the State Police, in any case, falls within the newly declared *good faith exception* to the exclusionary rule.

However, we wish to focus the Court's attention upon a crucial issue that has not been addressed by the parties, but which, we respectfully submit, should be considered by the Court. That issue is whether the Supreme Court of Rhode Island should apply its unique version of the law of search and seizure, and in so doing, ignore the rights of crime victims.

Long ago, Mr. Justice Cardozo in *Snyder* v. *Massachusetts,* 291 U.S. 97, 122 (1934) noted that, "Justice, though due to the accused, is due to the accuser also . . ." We submit that the passage of fifty years has not dulled the import of those words. If anything, the message of those words should ring in our Halls of Justice with renewed vigor in 1984.

The above named parties respectfully move the Court for leave to join the attached brief as additional *amici curiae.*

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ARGUMENT

THE RULING BELOW REGRESSES FROM THE CURRENT TREND AT ALL LEVELS OF SOCIETY TO RECOGNIZE AND ENHANCE THE RIGHTS OF CRIME VICTIMS.

One of the more encouraging aspects of our evolving criminal justice system has been the current trend towards recognizing and enhancing the rights of crime victims.[1] This has been demonstrated at the legislative,[2] executive,[3] and judicial[4] levels of government, as well as in the private sector.[5] Indeed,

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[1] *See, e.g.:* Carrington and Nicholson, "The Victims' Rights Movement: An Idea Whose Time Has Come," 11 Pepperdine L. Rev. 1 (1984).

[2] *See, e.g.:* The Omnibus Victim/Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1242, in which a number of specific rights of victims have been mandated by the Congress of the United States. *See also:* "Crime Victims Rights, a Legislative Analysis," published by the National Organization for Victim Assistance, Inc. (NOVA), Washington, D. C. (1984), a compendium of all state laws regarding compensation of and restitution to, crime victims together with other legislative enactments enhancing victims' rights.

[3] Every year since 1981 the President of the United States has proclaimed a designated week in April as "Victims Rights Week"; and, significantly, the Governors of most, if not all, states have followed this practice. Additionally, for the first time in the history of criminal justice, a national, Presidential-level Task Force was appointed by President Reagan in 1982, charged specifically with studying means to alleviate the plight of crime victims on the national, state and local levels. *See:* "Final Report, President's Task Force on Victims of Crime," United States Department of Justice, Washington, D.C. 20531 (December, 1982).

[4] *See, e.g., Bradley Center, Inc.* v. *Wessner,* 296 S.E. 2d 693 (Ga. 1982) (Criminal act of mental patient was forseeable and death was proximately caused by private hospital's negligence in issuing an unrestricted week end pass).

[5] The American Bar Association has created a Committee on Victims in its Criminal Justice Section which has taken a number of initiatives on behalf of crime victims by the organized legal profession.

this Court in *Morris* v. *Slappy*, ____ U. S. ____, 103 S.Ct. 1610 (1983), held that the U. S. Court of Appeals for the Ninth Circuit erred in reversing the rape and sodomy convictions of a defendant who had claimed that his Sixth Amendment right to counsel was violated when the trial court refused to grant a continuance while a particular Public Defender who the defendant wanted to represent him recovered from surgery, because an equally competent Public Defender had been appointed to replace the one in the hospital.

This Court took particular notice of the rights of victims in the criminal justice system:

> *But in the administration of criminal justice, courts may not ignore the concerns of victims.* Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. *Morris* v. *Slappy*, ____ U. S. ____, 103 S. Ct. 1610 at 1617. (emphasis supplied).

The instant case involves a cunning and vicious plot by a husband to secretly murder his wife. Such crimes are, by definition, extremely difficult to prove. The Supreme Court of Rhode Island recognized that and said:

> . . . we believe that when one views the evidence to which we have just alluded in light of the principles enumerated earlier, the reasonable inferences drawn from such evidence support a reasonable conclusion that in late December 1979 the defendant, mindful of the ultimatum of his intended bride, decided to take matters into his own hands, one of which held a syringe containing a copious quantity of insulin, and so injected the contents of the syringe into his wife with the intent that she should expire so that he would be free to marry Alexandra. ____ R. I. at ____, 475 A. 2d at 1021.

This case involves a situation in which there was a principal victim, Mrs. von Bulow, and a subsidiary victim, the

surviving son of the principal victim. The latter, knowing the difficulty of proving that his mother was assaulted, obtained evidence directly linking the defendant to the assault of his mother, and took this evidence to a highly respected and reputable attorney, who, after arranging a private test of the evidence, turned it over to the State Police. Without this initiative on the part of the victim's son, it is highly unlikely that the defendant would have been brought to trial.

The Rhode Island Supreme Court focused on the conduct of the State Police and their re-examination of the evidence discovered and given them by the victim's son. The victim, lying comatose, was in no position to locate the incriminating evidence, have it tested, and deliver it to the State Police. Her son acted vicariously on her behalf.

The Rhode Island Supreme Court's analysis of the factual distinctions between *United States* v. *Jacobsen*, ____ U.S. ___, 104 S. Ct. 1652 (1984) and *State* v. *Eiseman*, ____ R. I. ___, 461 A. 2d 369 (R. I. 1983) is without merit. Indeed, the court below chose to resolve federal constitutional issues on the basis of its own ideological interpretation in contrast to the judicial trends of this Court.

This leads to a bifurcation of justice. Had the defendant committed his crime in a state which follows the principle that the Supreme Court of the United States is the final arbiter of the meaning of the Fourth Amendment, it is likely that his conviction would have been sustained on the basis of *Jacobsen, supra.* Whether the constable "has blundered" now depends on the geographic loci of the crime rather than on this Court's interpretation of the constitution.

The factual setting of this case is important. The defendant was knowledgeable about the toxic effects of insulin upon hypoglycemic persons, such as his wife. He had dual motives for ending her life. His behavior during the first occasion in which his wife had suffered a non-fatal cardiac arrest had

aroused the suspicions of her son. After the second episode, the stepchildren contacted attorney Richard H. Kuh. Acting on his advice, the son conducted the private search which the Rhode Island Supreme Court has conceded did not violate the Fourth Amendment.

We submit, on the facts of this case, that Claus von Bulow did not have a "reasonable expectation" in the privacy of the articles he used to attempt the murder of his wife, especially in light of his earlier suspicious conduct attending the first coma. It is as reasonable to hypothesize that the defendant knew, or should have known, that the maid or children would make an effort to search the premises jointly inhabited by them in order to confirm their suspicions.

In its expression for concern about the rights of victims, this Court stated: "Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities . . ." *Morris* v. *Slappy*, ____ U. S. at ____, 103 S. Ct. at 1617. Again, the unique factual setting of this case requires an examination of the question of just who, in the son's mind, the "proper authorities" might have been. One would surmise in a more common situation that the "proper authorities" would have been the police. If, for example, Mrs. von Bulow had been assaulted with a firearm, it is almost certain that the son would have gone immediately to the local police department. But, to one in the son's position the matter was not that simple. He was suspicious that his mother had been assaulted by secretive means, giving a superficial appearance of natural causes, by someone with the expertise to be able to create that appearance. He must tread carefully, without rousing Claus von Bulow's suspicions or risk destruction of evidence.

The son, as a private citizen, could hardly have procured a search warrant, and he might well have believed that if he *had* gone to the police, with *only* his suspicions, they would have

taken the obvious first step in a criminal investigation and interviewed (and alerted) the defendant, thus giving him the opportunity to dispose of the incriminating evidence.

The son's action at this point was eminently reasonable: he not only sought out a lawyer, but, in addition, a lawyer whose prior position as District Attorney of New York County established him as an expert in criminal law and procedure. Mr. Kuh, knowledgeable in the law, advised the son as a private party to find the evidence (which was far more available to him) and then turn it over to the authorities. This is precisely what the young man did, and the defendant's conviction resulted.

If this Court is of a mind to reconsider the "independent and adequate" state ground doctrine, relied on by the court below, then we submit that this case provides an ideal opportunity and factual setting to do so. This is particularly true in light of the Court's recent pronouncements of the weight to be given to the victims of crime. If the ruling below is allowed to stand, the victim's son, *acting on the advice of counsel,* must see his efforts voided because of a strained interpretation of the law by a state court. We believe this is especially troublesome in view of this Court's decisions in *Michigan* v. *Long,* ____ U. S. ____, 103 S. Ct. 3469 (1983) and *Colorado* v. *Nunez,* ____ U.S. ____, 104 S. Ct. 1257 (1984).

As pointed out by Chief Justice William H. Erickson in his presentation before the National District Attorneys' Association (NDAA) Summer Conference in San Diego, California, August 13, 1984 (soon to be published in The Prosecutor, the official NDAA journal) it is unlikely that this Court will accept at face value a state court's incantation of the words "independent state grounds" without looking behind them for their true import:

> In *Michigan* v. *Long,* 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983), the Supreme Court erected a formidable barrier to

a state court's granting of rights to a criminal defendant on adequate and independent state grounds. "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we . . . will not undertake to review the decision." *Long,* 103 S. Ct. at 3476. When it is not clear that a state court decision does not rest primarily on federal law, and when the opinion does not contain a "plain statement" of the adequacy and independence of its state grounds, "we merely assume that there are no such grounds." *Id.,* 103 S. Ct. at 3476.

The announced goal of the bright-line requirements set forth in *Long* was to achieve uniformity among the states in their implementation of federal constitutional rights. The High Court's decisions this term reflect the Court's continuing interest in uniformity. *Colorado* v. *Nunez,* 104 S.Ct. 1257, 79 L.Ed.2d 338 (1984), reflects that the practical effects of *Long* may be more far-reaching than a black-letter reading of *Long* would indicate. Although the Supreme Court recognized the adequacy and independence of the state court's decision, *People* v. *Nunez,* 658 P.2d 879 (Colo. 1983), the interest in uniformity prompted three justices to reiterate the federal position on the contested issue.

There is no constitutional conflict between federal deference to the independence of state courts and the interest in uniform application of federal law. A perceived problem arises only when a state court breaks away from established federal court interpretations of the United States Constitution. *Especially when the literal text and the prior state court interpretations of a state constitution suggest a wholesale adoption of federal law, the Supreme Court is likely to view any purported adequate and independent state ground as a mere guise to avoid federal precedent.* [emphasis supplied]. *See, e.g., Ohio* v. *Johnson,* 104 S.Ct. 2536 (1984); *Oliver* v. *United States,* 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); *South Dakota* v. *Opperman,* 428 U.S. 364 (1976); *Oregon* v. *Haas,* 420 U.S. 714 (1975); *Williams* v. *Georgia,* 349 U.S. 375 (1955). The Court cannot be faulted for undertaking to resolve a conflict between settled federal law and an overly active state court. Taken

together, however, *Long* and *Nunez* suggest that the number of cases may be growing in which the Supreme Court sees a need to resolve the conflict. Erickson, "Pronouncements of the United States Supreme Court Relating to the Criminal Law Field: 1983-1984," The Prosecutor, Summer 1984, p____.

We submit that the "independent state grounds" basis for the decision of the Rhode Island Supreme Court is in fact a "guise to avoid federal precedent" and that its effect in this case is to deny the victims of crime their rightful opportunity to seek justice.

CONCLUSION

If the ruling of the Rhode Island Supreme Court is permitted to stand, intolerable confusion will augment the uncertainty that already prevails with respect to the constitutional controls over law enforcement investigative procedures. In practical effect, each one of the highest courts of the 50 states will be interpreting with unreviewable finality, the *Constitution of the United States*—a responsibility that should remain where it is, within the Supreme Court of the United States.

For these reasons *amici* submit that the judgment of the Supreme Court of Rhode Island should be reversed, and that a Writ of Certiorari should issue to review that court's erroneous decision of federal constitutional issues.

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